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No. 85-1126

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

*Petitioner*,

v.

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, and ASSOCIATION OF AMERICAN RAILROADS,

*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF IN OPPOSITION OF RESPONDENT ASSOCIATION OF AMERICAN RAILROADS

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February 6, 1986

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## QUESTION PRESENTED

Whether a general policy statement in which the Interstate Commerce Commission announced its decision to review prospective rail-motor acquisitions on a case-by-case basis is ripe for review by the Courts of Appeals prior to application of that policy to any specific transaction.

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## BRIEF IN OPPOSITION OF RESPONDENT ASSOCIATION OF AMERICAN RAILROADS

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Respondent Association of American Railroads ("AAR"), an intervening respondent below,[1] respectfully requests that this Court deny the petition for a writ of certiorari

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[1] A list of the member railroads of the AAR is printed in the Appendix to this Brief at 1a-7a.

seeking review of the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[2]

## COUNTER-STATEMENT

This case concerns the timing of judicial review of a new Interstate Commerce Commission ("Commission" or "ICC") policy on the acquisition of motor carriers by rail carriers.[3] The court below dismissed the petition for review of that policy statement on ripeness grounds, observing that a then-pending Commission proceeding involving application of the policy would provide a full and fair opportunity for judicial review.

In its policy statement, the Commission announced the replacement of a fifty-year-old policy that had rigidly restricted the authority of railroads to acquire motor carriers with a new policy that emphasized the Commission's discretion to evaluate proposed acquisitions on a case-by-case basis under 49 U.S.C. § 11344(c) (1982).[4] The new policy was a response to modern transportation conditions and revisions to the Interstate Commerce Act,[5] all of which required the reduction of regulatory constraints and the encouragement of intermodal operations.[6]

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[2] The decision below is reported at 770 F.2d 810 and is reprinted in the Appendix to the Petition at pages 6a-7a. The Petition will be cited herein as "Pet. at ——."

[3] Ex Parte No. 438, *Acquisition of Motor Carriers by Railroads*, 1 I.C.C.2d —— (July 20, 1984). The Commission's decision is reprinted in the Appendix to the Petition at pages 8a-37a.

[4] The policy statement eliminated the Commission's "special circumstances doctrine," which had created a presumption against rail acquisitions of motor carriers whose operation would not be auxiliary or supplemental to those of the rail carrier.

[5] These legislative changes were embodied in the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980), and the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980).

[6] In an earlier companion case, the Commission also revised its policy on licensing rail-affiliated motor carriers. *Applications for*

Despite the fact that the Commission's decision constituted only a general statement of prospective policy that had never been applied to the facts of any proposed transaction, petitioner sought review of the policy statement by the Ninth Circuit. Before that court, the ICC, the United States, and the AAR contended that review of the policy statement was premature because: (1) the interpretive statement had not affected or injured petitioner in any concrete or immediate way; and (2) the statement would not be fit for review until the Commission applied the new policy to a specific proposed acquisition, thereby identifying the concrete factors that satisfy the statutory criteria.[7] The Ninth Circuit agreed that the case was too abstract for judicial review at this time, emphasizing that: "Judicial review will be available to challenge an order of the I.C.C. that applies [the policy statement] to a specific factual situation." Pet. at 7a (citing *Toilet Goods Association v. Gardner*, 387 U.S. 158, 164-66 (1967)).

In so concluding, the Ninth Circuit was aware that a case pending before the Commission would give peti-

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*Motor Carrier Operating Authority by Railroads and Rail Affiliates*, 132 M.C.C. 978 (1982). Petitioner sought review of that policy in the Fifth Circuit, and its petition was consolidated with a case involving the Commission's application of the new policy in an actual licensing proceeding. *See American Trucking Associations v. ICC*, 682 F.2d 487 (5th Cir. 1982). On review of the consolidated petitions, the court affirmed both the new licensing policy and the grant of the individual license. *American Trucking Associations v. ICC*, 722 F.2d 1243 (5th Cir.), *cert. denied*, 105 S. Ct. 324 (1984). The Eighth Circuit has also reviewed and approved the licensing policy in the context of review of an actual license application. *Tri-State Motor Transit Co. v. ICC*, 739 F.2d 1373 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 3502 (1985).

[7] Respondents also demonstrated that, even if the policy statement were deemed ripe for review, it constituted a valid reinterpretation of a Commission-made policy in light of recent statutory amendments and economic developments.

tioner full opportunity for review of its claims. *See Norfolk Southern Corp.—Control—North American Van Lines, Inc.*, —— I.C.C.2d —— (F.D. 30500, May 13, 1985) ("*NS/NAVL*").[8] The Commission proceedings in *NS/NAVL*—in which petitioner was an active participant—focused on the concrete facts that necessarily were not before the ICC in the instant case.[9] After considering an extensive factual record, the Commission approved that transaction.

Petitioner has now appealed the *NS/NAVL* decision to the D.C. Circuit, seeking review of both the policy statement and its application to the proposed consolidation. *International Brotherhood of Teamsters v. ICC*, No. 85-1397 (D.C. Cir. filed June 28, 1985), Brief at 2-3. All parties in that case have agreed that the D.C. Circuit's review of the NS/NAVL transaction will encompass review of the policy statement itself. *See* ICC and U.S. Brief at 29; NS/NAVL Brief at 3. Each party's brief also addresses in detail the administrative record and the factual questions uniquely relevant to the NS/NAVL merger. That case is now fully briefed and awaiting oral argument before the D.C. Circuit.

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[8] That case required the Commission to apply its new policy statement to the proposed acquisition of North American Van Lines, a major motor carrier, by Norfolk Southern Corporation, a holding company that owns five Class I railroads, and to determine if the specific facts of the case satisfied the statutory standards.

[9] To permit resolution of the factual issues before the Commission, the parties in *NS/NAVL* developed a massive record that specifically detailed the transaction's probable impact on competition, the particular intermodal and product distribution services that the consolidated company would provide, and the projected effect of the transaction on shippers, employees, and the transportation of certain commodities. During the year-long proceedings, the parties engaged in substantial discovery, and numerous comments were received from shippers, experts in transportation economics, federal agencies, and state governments.

## REASONS FOR DENYING THE WRIT

### I. THE DECISION BELOW IS CORRECT AND EXTREMELY NARROW IN SCOPE

Petitioner's effort to transform a three-sentence *per curiam* opinion into a major pronouncement on the right to judicial review of administrative decisions is both unpersuasive and misleading. The decision below simply determined that review of a particular policy statement should be deferred until it had been applied in an individual case. Far from being an important or "novel" holding, Pet. at 9, the decision below merely constitutes a reasonable application of well-established principles.

As the Ninth Circuit recognized, review of this particular policy statement prior to its application would have been virtually meaningless. The Commission made no findings as to which rail-motor acquisitions would satisfy the public interest, public advantage, and competition criteria specified in the statute. Instead, the ICC merely announced that in the future it would make such findings on a case-by-case basis, weighing the concrete record presented to support each specific transaction against the statutory criteria. The actual effect of the policy thus could not be determined in the abstract, and premature judicial review would have been pointless.

Moreover, the Ninth Circuit knew that the Commission had before it an actual acquisition proceeding in which the challenged policy statement would be applied. The court expressly acknowledged that its analysis of the ripeness issue—including the question of threatened hardship to petitioner if review were deferred [10]—turned on the fact that petitioner would soon have an opportunity for review before a court that had the benefit of a fully developed administrative record.

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[10] *See Thomas v. Union Carbide Agricultural Products Co.*, 105 S. Ct. 3325, 3333 (1985); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

The Ninth Circuit's decision was thus grounded on the distinctive facts of this case, and its precedential effect is *de minimis*. Moreover, the decision below creates no conflict with the decisions of other Courts of Appeals and is fully consistent with this Court's admonition that federal courts avoid "entangling themselves in abstract disagreements over administrative policies." *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 200 (1983) (quoting *Abbott Laboratories*, 387 U.S. at 148). There is no occasion for further consideration by this Court.

## II. PETITIONER IS SEEKING AN ADVISORY OPINION

Petitioner also asks this Court to determine whether the Hobbs Act of 1950, 28 U.S.C. §§ 2341-2351 (1982), authorizes review of ICC policy statements within sixty days of their application in a specific case. Pet. at 11-13. But there was no Hobbs Act issue before the court below. The Ninth Circuit did not hold—nor did any party below contend—that the Hobbs Act precluded review in this case. Moreover, the only issue before the court below concerned review of the policy statement *prior* to its application.[11]

Petitioner has merely chosen this case as a vehicle to seek an advisory opinion on the availability of review in a hypothetical post-application case. This Court, however, has consistently refused to give "such advance expressions of legal judgment upon issues which remain unfocused." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961).[12]

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[11] The Ninth Circuit's dictum protecting petitioner's subsequent right to review, while explaining the premises for its decision, does not present a suitable ground for a grant of certiorari. "This Court . . . reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956).

[12] *See also Princeton University v. Schmid*, 455 U.S. 100, 102 (1982) (per curiam); *FCC v. Pacifica Foundation*, 438 U.S. 726, 735 (1978); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per

Moreover, petitioner's claim that the decision below threatens to "immunize[] agency decisions from review," Pet. at 11, is both insubstantial and contrary to fact. The "threat" petitioner purports to see does not arise from any decision denying post-application review of an administrative decision. To the contrary, the Courts of Appeals have uniformly held that if a challenge to a Commission decision is not ripe when the decision is issued, the Hobbs Act authorizes an appeal when the decision is applied.[13] The sole basis for the "threat" postulated by petitioner is a litigation position that the Government urged—unsuccessfully—in a prior case and that petitioner speculates might be asserted again at some future time. Pet. at 11-12.[14] With respect to this particular policy statement, however, petitioner at this very moment is fully exercising its right to post-application review before the D.C. Circuit in *NS/NAVL*, and the Government has expressly conceded in that case that the Hobbs Act does not bar such review.[15]

In short, no Hobbs Act issue is presented by the decision below, nor has petitioner shown any basis for contriving to insert one at this stage of review.[16] Petitioner's

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curiam); *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947).

[13] *See, e.g., American Trucking Associations v. ICC*, 747 F.2d 787, 791 (D.C. Cir. 1984) (policy statement); *Tri-State Motor Transit*, 739 F.2d at 1375 n.2 (policy statement); *Texas v. United States*, 730 F.2d 409, 415 (5th Cir. 1984) (regulation), *cert. denied*, 105 S. Ct. 3513 (1985); *Illinois v. ICC*, 722 F.2d 1341, 1349 (7th Cir. 1983) (regulation); *Baltimore Gas & Electric Co. v. ICC*, 672 F.2d 146, 148 (D.C. Cir. 1982) (interpretive order).

[14] The prior case to which petitioner refers is *Tri-State Motor Transit*, 739 F.2d 1373. The AAR was not a party in *Tri-State*.

[15] *See* Brief of ICC and U.S. at 29.

[16] Petitioner's unfounded speculation, Pet. at 10, that the D.C. Circuit might decide *sua sponte* in *NS/NAVL* that the Hobbs Act bars post-application review—despite the contentions of all parties

request for an advisory opinion on the Hobbs Act's applicability to ICC policy statements accordingly should be denied.

## CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 6, 1986

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—is without foundation and ignores a virtually unbroken line of cases to the contrary in that Circuit. *See, e.g., South Carolina Electric & Gas Co. v. ICC*, 734 F.2d 1541, 1546 (D.C. Cir. 1984); *Arkansas Power & Light Co. v. ICC*, 725 F.2d 716, 726 (D.C. Cir. 1984); *Cities of Batavia, etc. v. FERC*, 672 F.2d 64, 72 n.15 (D.C. Cir. 1982); *Geller v. FCC*, 610 F.2d 973, 977-78 (D.C. Cir. 1979) (per curiam); *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).

# APPENDIX

## APPENDIX

### *MEMBERS OF THE ASSOCIATION OF AMERICAN RAILROADS*

### *FULL MEMBER ROADS (U.S. LINES)*

Akron, Canton & Youngstown Railroad Company
Alton & Southern Railway Company
Atchison, Topeka & Santa Fe Railway Company
Baltimore & Ohio Railroad Company
    Curtis Bay Railroad Company
    Staten Island Railroad Corporation
Baltimore & Ohio Chicago Terminal Railroad Company
Bangor & Aroostook Railroad Company
    Van Buren Bridge Railroad
Belt Railway Company of Chicago
Bessemer & Lake Erie Railroad Company
Birmingham Southern Railroad Company
Burlington Northern Railroad Company
[Canadian Pacific Limited—lines operated in U.S.]:
    Canadian Pacific lines in Maine
    Canadian Pacific lines in Vermont
Chesapeake & Ohio Railway Company
    Covington & Cincinnati Elevator Railroad & Transfer & Bridge Company
Chicago & Illinois Midland Railway Company
Chicago & North Western Transportation Company
Chicago & Western Indiana Railroad Company
Chicago, Milwaukee, St. Paul & Pacific Railroad Company
Colorado & Southern Railway
Consolidated Rail Corporation
Denver & Rio Grande Western Railroad Company
Detroit & Mackinac Railway Company
Duluth, Missabe & Iron Range Railway Company
Elgin, Joliet & Eastern Railway Company
Fort Worth & Denver Railway
Galveston, Houston & Henderson Railroad Company

[Grand Trunk Corporation—and other lines in the U.S. indirectly controlled by the Canadian National Railways]:
Grand Trunk Western Railroad Company
Detroit, Toledo & Ironton Railroad Company
Central Vermont Railway, Inc.
Duluth, Winnipeg & Pacific Railway Company
[Canadian National Railways]:
Lines in Michigan
Lines in New England
Lines in New York
Lines in Vermont
Green Bay & Western Railroad Company
Houston Belt & Terminal Railway Company
Illinois Central Gulf Railroad Company
Chicago & Illinois Western Railroad Company
Waterloo Railroad
Kansas City Southern Railway Company
Arkansas & Western Railway Company
Fort Smith & Van Buren Railway Company
Kansas & Missouri Railway & Terminal Railroad
Kentucky & Indiana Terminal Railroad
Lake Superior & Ishpeming Railroad Company
Lake Terminal Railroad Company
Louisiana & Arkansas Railway Company
McCloud River Railroad Company
McKeesport Connecting Railroad Company
Maine Central Railroad Company
Portland Terminal Company
Manufacturers Railway Company
Metro North Commuter Railroad Company
Missouri-Kansas-Texas Railroad Company including Beaver, Meade & Englewood Railroad Company
Missouri Pacific Railroad Company
Brownsville & Matamoros Bridge Terminal Company
Chicago Heights Terminal Transfer Company
Doniphan, Kensett & Searcy Railway Company
Weatherford, Mineral Wells & Northwestern Railway Company

National Railroad Passenger Corporation (AMTRAK)
Newburgh & South Shore Railway Company
Norfolk & Western Railway Company
    Chesapeake Western Railway Company
    Lake Erie & Fort Wayne Railroad Company
    Lorain & West Virginia Railway Company
    New Jersey, Indiana & Illinois Railroad Company
    Norfolk, Franklin & Danville Railway Company
Peoria & Pekin Union Railroad Company
Pittsburg & Shawmut Railroad Company
Pittsburgh & Lake Erie Railroad Company
    Montour Railroad Company
    Youngstown & Southern Railway Company
Prescott & Northwestern Railroad Company
Richmond, Fredericksburg & Potomac Railroad Company
St. Louis Southwestern Railway Company
Seaboard System Railroad, Inc.
    Gainesville Midland Railroad Company
Soo Line Railroad Company
    Sault Ste. Bridge Company
Southern Pacific Transportation Company
    Holton Inter-Urban Railway Company
    Northwestern Pacific Railroad Company
    Petaluma & Santa Rosa Railroad Company
    Visalia Electric Railroad Company
Southern Railway System
    Alabama Great Southern Railroad Company
    Algers, Winslow & Western Railway Company
    Atlantic & East Carolina Railway Company
    Camp Lejeune Railway Company
    Carolina & Northwestern Railway Company
    Central of Georgia Railroad Company
    Cincinnati, New Orleans & Texas Pacific
      Railway Company
    Georgia Northern Railway Company
    Georgia Southern & Florida Railway Company
    Interstate Railroad Company
    Live Oak, Perry & South Georgia Railway Company
    Louisiana Southern Railway Company

State University Railroad Company
Tennessee, Alabama & Georgia Railway Company
Tennessee R[illegible] Company
Texas Mexican R[illegible] Company
Union Pacific Railroad Company
Spokane International Railroad Company
Mt. Hood Railway Company
Union Railroad Company (Pittsburgh)
Vermont Railway, Inc.
Western Maryland Railway Company
Western Pacific Railroad Company
Sacramento Northern Railway Company
Tidewater Southern Railway Company
Western Railway of Alabama
Atlanta & West Point Rail Road Company
Winston-Salem Southbound Railway
High Point, Thomasville & Denton Railroad

*SPECIAL CANADIAN AND MEXICAN MEMBER ROADS*

*CANADIAN LINES (in Canada)*

Algoma Central Railway
British Columbia Hydro & Power Authority
British Columbia Railway
Canadian National Railways
Canadian Pacific Limited
Ontario Northland Railway
Toronto, Hamilton & Buffalo Railway
White Pass & Yukon Corp. Ltd.

*MEXICAN LINES (in Mexico)*

Chihuahua Pacific Railway Company
[Direction General de Ferrocarriles en Operacion]:
Ferrocarril Sonora-Baja California, S.A. de C.V.
Ferrocarriles Unidos del Sureste, S.A. de C.V.
Ferrocarril del Pacifico, S.A. de C.V.
National Railways of Mexico

*ASSOCIATE MEMBERS*

Alaska Railroad
Aliquippa & Southern Railroad Company
American Refrigerator Transit Company
Apalachicola Northern Railroad Company
Belfast & Moosehead Lake Railroad Company
Boston & Maine Corporation
Springfield Terminal Railway
California Western Railroad
Centromen Puru Incorporated
Chestnut Ridge Railway
Chicago Short Line Railway Company
Chicago South Shore & South Bend Railroad
Chicago, West Pullman & Southern Railroad Company
Cities Service Company Railroad
Cliffs Western Australian Mining Co. Pty. Ltd.
(AUSTRALIA)
Colorado & Wyoming Railway Company
Cuyahoga Valley Railway Company
Dardenelle & Russellville Railroad Company
Delaware & Hudson Railway Company
Greenwich & Johnsville Railway Company
Delray Connecting Railroad Company
Devco Railway (Cape Breton Dev. Corp.—Coal Div.)
(CANADA)
Duluth & Northwestern Railroad Company
East Erie Commercial Railroad
East Jersey Railroad & Terminal Company
East St. Louis Junction Railroad Company
Empresa Minera Del Centro Del Peru Railways (PERU)
Essex Terminal Railway (CANADA)
Fepasa-Ferrovia Paulista (BRAZIL)
Fruit Growers Express Company
Genesee & Wyoming Railroad Company
Grafton & Upton Railroad Company
Graysonia, Nashville & Ashdown Railroad Company
Great Western Railway Company